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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BRIAN R. SILVER, Plaintiff and Appellant, v. STEVEN G. HASTY, et al., Defendants and Respondents.	A153369 (Napa County Super. Ct. No. 26-67005)

In this dispute between owners of adjacent commercial properties, appellant Brian R. Silver argues the trial court was biased and erred in denying appellant's motion to change venue, excluding certain expert witness testimony, and prejudicing appellant during voir dire. We affirm.

BACKGROUND

The underlying facts are largely irrelevant to the issues on appeal. Appellant owns certain commercial real property. Respondent Steven G. Hasty owned adjacent commercial real property. A dispute arose involving an easement on an alley between the parties' properties and air conditioning units located in the alley.

Appellant sued Hasty and related entities (collectively, respondents) for conversion; ejectment, forcible detainer and trespass; quiet title; private nuisance; injunctive relief; and civil harassment. Following a court trial on equitable claims and a jury trial on legal claims, judgment on all claims issued for respondents.

DISCUSSION

I. *Judicial Bias*

Appellant argues his due process rights were violated because the superior court judge was biased against him. We reject the challenge.

"[T]he United States Supreme Court's due process case law focuses on actual bias. This does not mean that actual bias must be proven to establish a due process violation. Rather, consistent with its concern that due process guarantees an impartial adjudicator, the court has focused on those circumstances where, even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become 'constitutionally intolerable.' [Citation.] The standard is an objective one." (*People v. Freeman* (2010) 47 Cal.4th 993, 1001 (*Freeman*).) "[T]he due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under more expansive disqualification statutes and codes of judicial conduct." (*Id.* at p. 1005.)

Appellant first argues that, in an unrelated case in which appellant was a party, the same bench officer exhibited bias against appellant. This unrelated case is currently pending on appeal in Division Four of this court (No. A146586). We previously issued an order denying appellant's request for judicial notice of the appellate briefs and portions of the record on appeal in No. A146586, as well as his request to transfer the instant appeal to Division Four. Appellant filed a petition for review of this order in the California Supreme Court, which denied review. We accordingly disregard the arguments in appellant's brief which depend on the briefs and/or record on appeal in No. A146586, including appellant's assertion that several of the trial court's adverse rulings in that case "were unsupported by fact or law" and are thus evidence of bias.

However, a few brief portions of the record in the unrelated case are properly before us, submitted with a statutory disqualification motion filed by appellant below. Specifically, appellant submitted evidence of the following comments made by the bench

officer in the prior case, to or about appellant: "Isn't it nice and peaceful when Brian Silver is not talking"; "Now you are looking away from me. You are not looking away from me. You are not listening"; appellant was not being "proactive" with respect to his vineyard, which was at issue in the prior case; and appellant chose to "*abscond* from his responsibility"[1] (italics added). Based on the limited record before us, these statements suggest the bench officer's frustration with appellant's conduct—both in the courtroom and with respect to the vineyard at issue in that case—but do not indicate actual bias or a " 'constitutionally intolerable' " probability of bias. (*Freeman*, *supra*, 47 Cal.4th at p. 1001.)

Appellant next points to the bench officer's disclosure that his son worked as an office assistant in respondents' counsel's law firm for approximately five months in 2012 and 2013, during summer and winter breaks while he was a college student.[2] At the time of the disclosure, the bench officer's son was a second-year law student at the University of Chicago Law School and would be working at an international law firm in Southern California the summer after his second year. The bench officer opined that his son's "particular legal interests make it unlikely that he will return to Napa to practice law."[3] In short, the bench officer's son briefly performed office assistant work for respondents' counsel years before trial, and the son is not likely to seek work with respondents' counsel again in the future. We see no probability of bias depriving appellant of his due process rights.

Finally, appellant points to the following statement by the bench officer, during the hearing on appellant's motion for a new trial: "[F]rankly, as has been pointed out here I've presided over two matters involving this case and the County of Napa case from a

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[1] For the reasons discussed above, we disregard appellant's argument that this statement was "not supported by evidence or law" and consider only whether, on its face, it evidenced bias.

[2] Appellant filed a second motion for disqualification based on this disclosure.

[3] Respondents' counsel's law firm is a Napa Valley firm.

couple of years ago, and the only observation I can make about that experience is that Mr. Silver at times seems to have difficulty seeing any other version of the facts than his own." The comment does not render this case the type of "exceptional case presenting extreme facts where a due process violation will be found." (*Freeman, supra,* 47 Cal.4th at p. 1005.)

II. *Venue*

In July 2017, appellant filed a motion to change venue. Appellant submitted Napa Valley Register articles from 2014 to 2015 reporting on appellant's refusal to perform mandatory seismic retrofitting on his commercial property and the subsequent danger his property posed to adjacent buildings after the 2014 Napa earthquake, and on Napa County's allegation that appellant's vineyard was a public nuisance.[4] Appellant also submitted online comments to some of the articles, which included negative comments about appellant. Appellant contended there was reason to believe an impartial trial could not be had in Napa County (Code of Civ. Proc., § 397, subd. (b)).[5] The trial court denied the motion.

As an initial matter, the order may be nonappealable. (*Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 41–42 ["the order denying the venue motion . . . . is nonappealable"].) Assuming it is appealable, we find no error. "Not only is the standard of review abuse of discretion, but [appellant] must show actual prejudice." (*Nguyen v. Superior Court* (1996) 49 Cal.App.4th 1781, 1791 (*Nguyen*).)[6]

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[4] Appellant also submitted two 2016 Napa Valley Register articles reporting on appellant's reconstruction work on his commercial property. Appellant claims all of the articles were defamatory. We express no opinion on the issue, which is not before us.

[5] Appellant also contended below that no Napa County judge was qualified to act on the lawsuit (Code Civ. Proc., § 397, subd. (d)). His appellate brief makes no argument about this ground for venue change and we therefore consider the issue abandoned. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [appellant's "failure to brief the . . . issue constitutes a waiver or abandonment of the issue on appeal"].)

[6] Appellant argues the standard of review should be de novo in light of the bench officer's bias. Because we have rejected appellant's bias claim, we also reject this argument.

The trial court found appellant unreasonably delayed in filing the motion "based on the date of the supporting newspaper articles, many of which existed when [appellant] filed his complaint and defendants filed their answer." Appellant does not dispute that the motion must be made within a reasonable time of learning of the potential for prejudice, nor does he offer any explanation why he waited nearly a year after the last article to file his motion. Accordingly, we affirm the order denying the motion as untimely.

As an independent basis for denying the motion, the trial court found appellant "has not shown actual prejudice based on the newspaper articles and the accompanying online negative comments." Appellant fails to demonstrate the trial court abused its discretion in concluding no actual prejudice was shown from newspaper articles about two discrete issues over a period of two or three years. (See *Nguyen*, *supra*, 49 Cal.App.4th at p. 1791 [evidence of prejudice submitted by the defendants in a red light abatement action—"two newspaper articles reported the raid on the businesses, the city and county spent just over $5,000 investigating the businesses, and a declaration by an employee for [the defendants'] counsel stated people told him the police department asked them if they supported shutting down the businesses"—was a "limited showing [that] does not demonstrate a widespread feeling of prejudice extending over a long time"]; cf. *People v. Ocean Shore R.R.* (1938) 24 Cal.App.2d 420, 427–428 [dozens of affidavits showed "a widespread feeling of prejudice extending over a long period of years [against one of the parties] . . . , such as would at least make it extremely doubtful whether an impartial trial could be had before a jury in that county"].)

III. *Expert Witness Testimony*

Appellant, an attorney, listed himself as an expert witness "on the issue of easements and the rights and obligations of dominant and subservient tenements in the context of an easement appurtenant." Respondents filed a motion in limine seeking to exclude expert testimony on legal issues. The trial court granted the motion. The court expressly clarified that appellant would be permitted to testify "as a lay witness" about "his interpretation" of the easement.

The parties dispute the appropriate standard of review. Under any standard, we find no error. The trial court properly excluded expert testimony on the law of easements. (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 ["There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law."]; *Amtower v. Photon Dynamics, Inc*. (2008) 158 Cal.App.4th 1582, 1598–1599 [" '[t]he calling of lawyers as "expert witnesses" to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts' "].) Appellant asserts, without citation to authority, that "the law allows an owner to testify regarding his understanding of legal issues concerning his property." So assuming, appellant has not demonstrated error: the trial court's ruling permitted appellant to testify about his interpretation of the easement, and appellant did testify about his understanding of what the easement allowed and prohibited.

IV. *Voir Dire*

A. *Additional Background*

Before jury selection, appellant submitted a 10-page, 61-question questionnaire "intended to ferret out prospective jurors who had read some of that adverse publicity [submitted with the venue change motion]." The trial court found "a lot of the questions . . . are unduly intrusive with regards to the jurors' personal lives, their personal interests and things of that nature" and determined the lengthy questionnaire was not "warranted given the fact that this trial is going to take at most a week." The court stated it would be willing to consider a "one-page questionnaire for the panel that's specific to the issues that plaintiff is raising."

Appellant subsequently submitted one page containing 12 questions, and later an additional two questions. Appellant's brief characterizes these subsequent filings as a "questionnaire." The caption of both filings states appellant was submitting the questions as "additional voir dire questions to be asked by [the] court." (Capitalization altered.) Appellant contends the trial court refused to allow use of this shorter "questionnaire," but the record cite provided is to the court's ruling on the 10-page questionnaire. With

respect to the subsequent submissions, the trial court asked appellant's counsel, "is there a reason why that can't be an inquiry you delve into when you question prospective jurors?" Appellant's counsel responded, "No. I just thought when Your Honor does it, it's a little bit more expeditious because you can do it to the entire panel." The court responded that appellant's counsel "can do it to the panel as well."[7]

During voir dire, appellant's counsel asked the panel whether any panel member "ha[s] a memory of reading about Mr. Silver or Mr. Hasty in the Napa Valley Register" or "ha[s] a memory about hearing issues involving real property owned by either Mr. Hasty or Mr. Silver?"[8] Three prospective jurors answered affirmatively to one or both questions. The court privately questioned these three prospective jurors, excused them for cause, and admonished them not to discuss the matter with the other prospective jurors. Once the jury was empaneled, the court instructed the jurors not to do any independent research.

B. *Analysis*

Appellant argues the trial court "unreasonably denied him the opportunity to use a jury questionnaire, which would have shielded the jury venire from factual information regarding adverse publicity falsely directed toward Appellant. Instead, the Court allowed the entire panel to become distinctly aware of a body of adverse publicity, which ultimately prejudiced him."

To the extent appellant argues the trial court erred in refusing use of the 10-page questionnaire, we reject the claim. The determination is within the court's discretion.

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[7] Appellant's brief asserts that his counsel asked if he "could voir dire each juror privately." He provides no record citation for this assertion and we disregard it. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 970 [" 'Any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—must be supported by a citation to the record.' [Citation.] We have the discretion to disregard contentions unsupported by proper page cites to the record."].)

[8] These questions were nearly identical to two questions on appellant's list of additional voir dire questions to be asked by the court.

(Code Civ. Proc., § 222.5, subd. (f) ["A trial judge shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel."].) It was not arbitrary or unreasonable for the trial court to conclude the 10-page questionnaire was excessive for this case.

To the extent appellant argues the trial court refused to allow use of the shorter "questionnaire," appellant's counsel below readily agreed to ask the questions of the panel himself, and expressed a preference for asking the panel altogether rather than questioning each prospective juror individually. Appellant waived any claim that the questions should have been asked in a questionnaire or of each prospective juror in private. (*Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 378 ["A party may be deemed 'to have *waived* a claim of error either by affirmative conduct or by failure to take proper steps in the trial court to avoid or cure the error.' "].)

Even if the claim were not waived, we would reject it. Appellant asserts he was prejudiced because the jurors "likely . . . visited social media to satisfy their curiosity and in so doing became aware of the facts that were not admitted during the trial but which would have falsely created an adverse impression of Appellant." Appellant fails to explain why the jurors were more "likely" to do so after being orally asked the questions with the rest of the panel than if they were asked the same questions in a written questionnaire or in private. Further, the court instructed the jury not to perform independent research and, " '[a]bsent some contrary indication in the record, we presume the jury follows its instructions . . . .' " (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 162.) Finally, the only support appellant provides for his bare speculation about the jurors' conduct is the jury's quick defense verdict "after Respondent had been forced to admit his liability." Appellant's brief includes no discussion of the trial testimony on liability issues and gives us no basis to conclude the quick jury verdict was based on anything other than the evidence. Absent record evidence to the contrary, we so presume. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 ["it is a fundamental principle of appellate procedure that a trial court judgment is

ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment"].)[9]

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

[9] Respondents contend appellant forfeited his challenges on appeal as to all respondents except Hasty. Because we reject appellant's challenges with reasoning applicable to all respondents, we need not decide the issue.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A153369)